

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>NATIONWIDE MUTUAL FIRE</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>INSURANCE COMPANY,</b>	<b>:</b>	
	<b>:</b>	
<b>Plaintiff,</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>GEORGE H. MCKALE, PATRICIA A.</b>	<b>:</b>	
<b>MCKALE, and BRANDY O'DONNELL,</b>	<b>:</b>	
	<b>:</b>	
<b>Defendants.</b>	<b>:</b>	<b>NO. 97-386</b>

**MEMORANDUM - ORDER**

**AND NOW**, this 27th day of May, 1998, upon consideration of the motion of plaintiff Nationwide Mutual Fire Insurance Company ("Nationwide") for summary judgment (Document No. 32), the response of defendants George H. McKale and Patricia A. McKale ("the McKales") (Document No. 34), the response of defendant Brandy O'Donnell ("O'Donnell") (Document No. 33), and the surreply of Nationwide thereto (Document No. 35), having found and concluded that:

1. Nationwide issued a homeowner's policy to the McKales providing coverage for their residence at 743 Tulip Street, Croydon, Pennsylvania. On March 11, 1996, a fire occurred at the residence, and the McKales submitted a claim for losses to Nationwide. At the time of the fire, O'Donnell resided at the house with her parents, the McKales. The fire marshal and an expert retained by Nationwide investigated the fire and ruled it incendiary.<sup>1</sup> Nationwide began an investigation of the McKales in July of 1996. During questioning under oath, George McKale responded that his only source of income was his worker's compensation benefits and that his wife was not receiving any income. In January of 1997, Nationwide filed this lawsuit seeking declaratory judgment against the defendants. During discovery, George McKale revealed that he and his wife received income from their participation in various flea markets and that he had not disclosed this income in the earlier interview "on the advice of counsel." (McKale dep. at 61, Pl.'s Mem. Ex. C);

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<sup>1</sup> The defendants' retained an expert who investigated the fire and ruled it accidental.

2. The insurance policy issued to the defendants provides that Nationwide does “not provide coverage for an insured who has by design concealed or misrepresented a material fact or circumstance relating to this insurance.” Under Pennsylvania law, an insurance policy is void for misrepresentation if the insurer establishes that the representation was false, that the insured knew that the representation was false when made or made it in bad faith, and that the representation was material to the risk being insured. See New York Life Insurance Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991) (citing Shafer v. John Hancock Mutual Life Insurance Co., 189 A.2d 234, 236 (Pa. 1963)). In addition, the insurer must show that the insured made the misrepresentation with a deliberate intent to deceive. See Donaldson v. Farm Bureau Mutual Automobile Insurance Co., 14 A.2d 117, 118 (Pa. 1940); Piccinini v. Teachers Protective Mutual Life Insurance Co., 463 A.2d 1017, 1024 (Pa. Super. Ct. 1983);

3. The issue before the Court is the materiality of the alleged misrepresentation. Materiality is generally a mixed question of law and fact which precludes a court from granting summary judgment on the issue; however if the facts misrepresented are such that “reasonable minds cannot differ on the question of materiality,” the issue may be resolved as a matter of law at the summary judgment stage. Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 771 (3d Cir. 1976). While a court should hold that misrepresentations are material as a matter of law if they are “palpably and manifestly” material to the risk, the question of materiality should be submitted to the jury if it is doubtful. Karcher v. Security Mutual Life Insurance, 140 A.2d 852, 854 (Pa. Super. Ct. 1958);

4. In the context of an insurance policy, whether a misrepresentation is material depends on whether the misrepresentation “concerns a subject relevant and germane to the insurer’s investigation as it was then proceeding,” Parasco v. Pacific Indemnity Co., 920 F. Supp. 647, 655 (E.D. Pa. 1996) (applying Pennsylvania law). The Superior Court of Pennsylvania held that misrepresentations made in the context of an application for insurance were material “[i]f these [misrepresented] statements influenced the judgment of the insurer in selling the policy and in accepting the risk.” Karcher, 140 A.2d at 854. Courts applying Pennsylvania law have held that misrepresentations made during inquiries into the financial status of the insured are material to the issue of motive in cases of suspected arson. See Sphere Drake Insurance Co. v. Zakloul Corp., No. 96-8123, 1997 WL 312217 (E.D. Pa. June 3, 1997) (insureds misrepresented to insurer that they had no outstanding debt and had never been sued during investigation of fire at their business establishment); Parasco, 920 F. Supp. at 654 (insured provided fraudulent tax returns and other financial information to bank for mortgage on house that was destroyed in fire); Peer v. Minnesota Mutual Fire & Casualty Co., No. 93-2338, 1995 WL 141899 (E.D. Pa. March 27, 1995) (insured failed to disclose \$224,725 debt to insurer during investigation of fire);

5. Nationwide argues that information about the income of the McKales was material as a matter of law to the investigation by Nationwide, and thus under the insurance policy and Pennsylvania law, Nationwide is entitled to summary judgment in its favor. The defendants argue that the misrepresentation, if any, by George McKale was not material as a matter of law because an insurer conducts a financial inquiry of the insured when a fire is deemed incendiary in order to determine whether the insured was motivated to collect insurance proceeds to alleviate a financial hardship. The defendants claim that Nationwide turns this logic on its head by arguing that George McKale's nondisclosure of the relatively insubstantial flea market income was material to its investigation, when in fact the initial nondisclosure of this income made the McKales' financial status appear more dire and thus more indicative of a motive to commit arson to collect the insurance proceeds. Thus, the McKales contend that questions of fact regarding the materiality of this information remain which preclude summary judgment in favor of Nationwide;

6. While a misrepresentation by an insured about his financial status may be material to an investigation of arson, this Court cannot conclude that the alleged misrepresentation by George McKale was material as a matter of law and that reasonable minds could not differ as to the materiality of the misrepresentation. Taking all reasonable inferences in the defendants' favor, I find that Nationwide has produced no evidence that the alleged misrepresentation was germane to its investigation as it was then proceeding or that it influenced Nationwide's judgment; indeed, Nationwide indicates that it already suspected the defendants' claim for loss was not genuine and their finances became relevant as soon as Nationwide had information that the fire was incendiary. (Pl.'s Mem. at 3). Indeed, unlike the insureds in Sphere, Peer, and Parasco, George McKale's alleged misrepresentation indicated to Nationwide that he was in a worse financial situation at the time of the fire than he actually was, which may have increased Nationwide's suspicion that the defendants were responsible for the fire. There is no evidence that George McKale misrepresented his income, in the language of the policy, "by design" to defraud the insurance company; according to his deposition testimony, George McKale did not reveal the flea market income because his former attorney advised him that such income was illegal. (McKale dep. at 61, Pl.'s Mem. Ex. C). Although Nationwide claims that it suffered prejudice and that its investigation was hampered by the misrepresentation, it does not point to any evidence of such prejudice other than its conclusory statements. Viewing the evidence in the light most favorable to the defendants, I conclude that reasonable minds could differ on the question of the materiality of George McKale's misrepresentation, and thus, a genuine issue of material fact remains;

it is accordingly hereby **ORDERED** that the motion is **DENIED**. **IT IS FURTHER**

**ORDERED** that the parties shall submit a joint report to the Court no later than **June 15, 1998**

as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report should so indicate. By said date, the plaintiff shall contact the Deputy Clerk to arrange a date for a final scheduling conference.

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**LOWELL A. REED, JR., J.**